No. 13078

United States Court of Appeals for the Ninth Circuit.

SOUTHERN PACIFIC COMPANY,

Appellant,

vs.

ROGER N. LIBBEY,

Appellee.

Supplemental Transcript of Record

Appeal from the United States District Court for the Northern District of California, Southern Division.

Phillips & Van Orden Co., 870 Brannan Street, San Francisco, Calif.

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Appeal from the United States District Court for the Northern District of California, Southern Division.

Phillips & Van Orden Co., 870 Brannan Street, San Francisco, Calif.

In the District Court of the United States, for the Northern District of California, Southern Division

No. 30085

ROGER N. LIBBEY,

Plaintiff,

vs.

SOUTHERN PACIFIC COMPANY, a Corporation,

Defendant.

Before: Hon. Louis E. Goodman, Judge.

REPORTER'S PARTIAL TRANSCRIPT MOTION TO AMEND ANSWER

Appearances:

For the Plaintiff:

RYAN & RYAN, By
THOMAS RYAN, ESQ.,
DANIEL RYAN, ESQ.

For the Defendant:

DUNNE, DUNNE & PHELPS, By
ARTHUR B. DUNNE, ESQ.

(Proceedings had after the selection of a jury, not in the presence of the jury.)

Mr. Dunne: If Your Honor please,——

Mr. Thomas Ryan: Before counsel begins, Your Honor, may I have an order excluding witnesses and excluded especially while he is making this

motion to amend the answer, which I think may be pertinent.

The Court: Any persons you wish to remain inside?

Mr. Thomas Ryan: Just the plaintiff and his wife. The rest I wish excluded.

Mr. Dunne: No objection to that.

The Court: All those who have been summoned as witnesses in this case will remain outside the courtroom until your names are called—those who are summoned as witnesses in this case.

Mr. Dunne: If Your Honor please, the point of this amendment to the answer will become readily apparent if Your Honor will look at the complaint. In Paragraph 3, it is alleged that on the 11th of August, 1950, between the hours of 10 and 11 p.m., thereof plaintiff was employed by defendant as a student fireman at Roseville.

By inadvertence at the time the answer was filed, my office not being fully advised, we admitted that plaintiff was employed by defendant as a student fireman. Also alleges that [2*] at said time plaintiff was in a certain switch engine, which is not exactly the fact. That is not material. I think there is no dispute, be no dispute between us about the facts, but there is a possible implication that arises from the use of the word "employed" there and a question may possibly arise as to whether or not this man was in fact, if a student fireman without compensation, an employee within the

*** Page numbering appearing at top of page of original Reporter's Transcript of Record.**

meaning of the Federal Employers' Liability Act.

What we propose to do is to strike out that answer, that sentence and the next sentence, and substitute for it a statement of the facts, that the plaintiff was on our premises as a student fireman agreeably to the provisions of an application for permission to observe operation of locomotives, cars and trains, and we attach a copy of that writing to the complaint.

Now, that Your Honor may be further advised on this matter, and I can't say exactly how the details of the evidence will develop, the authorities would indicate that the mere fact that a man wasn't compensated and the mere fact that in addition to that he was in the process of learning, does not exclude him from the Federal Employers' Liability Act as an employee.

I think this is fair to say that although he is just learning and isn't being compensated at the time, if, in fact, what he is doing is under the control of the railroad and if, in fact, he is performing service at the time and at the time [3] he is doing what in the course of learning he has been directed to do, that he is an employee within the meaning of the Federal Employers' Liability Act; but that if he has deviated from that or perhaps if he has not performed service, he is not, or at any rate that is a question of fact for the jury, or may be a question of fact for the jury.

Now, so far as the pleadings are concerned his status as student fireman is and will be admitted under the amended answer, but what I seek to do

is avoid any possible snarls that may arise from the use of the word "employed" in contradistinction to a statement of the facts.

There is one case in the books that would indicate that if that language stood by itself without any further information as to the detail of what the man was doing that he would be treated as an employee within the meaning of the Federal Employers' Liability Act.

The answer, even in its present form, however, raises the question as to whether or not at the time, at the precise time of the accident he was employed as a student fireman because the only allegation that is admitted is the general one as to general status, and we have also raised the question of interstate commerce. Now, I think those questions will eventually develop themselves in the evidence and those questions Your Honor will rule upon as a matter of law, submit them to the jury. [4]

I suggest that, only suggest to Your Honor that eventually in the course of this trial, to find out exactly what the man was doing, it may become necessary to find out how he was on the premises, what directions he had been given, and the course of the evidence will, in my opinion, in no way be changed by whether this amendment is made or not, and I say the only purpose of the amendment is to remove that possible implication.

Now, there follows with that in the amendment an additional defense for grounds upon the basis of this permission under which the man in the

course of his permission assumes the risk of injury, and we have set up that as a separate defense. I may say to Your Honor, if he is an employee within the meaning of the Federal Employers' Liability Act and there is a case distinctly on this point in the case of a student which was held to be an employee, the agreement, of course, would not be of any effect under Section 5 of the Federal Employers' Liability Act.

The Court: If he was in fact a student.

Mr. Dunne: If in fact.

The Court: Then if an employee, then of course the doctrine of assumption of risk——

Mr. Dunne: Does not apply, and any agreement by which we seek to limit our liability would be void under Section 5 of the Act, if it applies. [5]

The Court: The issue of fact will be whether he was at the time——

Mr. Dunne: The issue of fact——

The Court: ——a student learning and if he was then the Act applies.

Mr. Dunne: That is, if the other facts make the Act apply, that is correct, and unless the facts develop in such a way, of course, there is question, or a question of inference as to what his status was, whether he was performing service, and as I say, it is to avoid a snarl that might arise, some implication, that we tender the amendment.

The Court: Doesn't make much difference whether we allow the amendment or not, we don't pay much attention to the pleadings. If that is

the issue the Court can make an order determining that is the issue of the case, Mr. Ryan?

Mr. Thomas Ryan: Yes, as counsel says there is one leading case in the United States on this question of a student fireman, Watkins vs. Thompson, in 72 Fed. Supp. 953 at 959, a decision of Judge Hulen, of the District Court for the Eastern District of Missouri, in 1947, and in that decision Judge Hulen correlates all the cases in the United States, and there are not too many of them on the question of a student employee and whether he comes within the Federal Employers' Liability Act.

Now, and as counsel says, if the man is under the control and under the direction of the railroad, then he is, even [6] though at the particular moment of the accident he might not be doing exactly—for instance, in the Watkins case——

The Court: I understand that, Mr. Ryan. Do you object to this amendment?

Mr. Thomas Ryan: I suppose I should on the ground that is comes at the last minute and that the facts were always in the—that the defendant always had the facts in his possession.

The Court: Well, even if he did it may have been inadvertence in not raising that particular issue in the pleadings. I don't think it makes much difference, but frankly, as I say, irrespective of what the pleadings show, if that is one of the issues, why, the Court can make an order, as if in pre-trial, saying that is the issue.

Mr. Thomas Ryan: All right.

The Court: However, I don't urge you to do anything.

Mr. Thomas Ryan: I won't consent to it, but I am not going to argue it, but I might say this, as long as this is almost a pre-trial conference, at the last minute Your Honor might recall we put in two counts, one first being under the Boiler Inspection Act. As Your Honor knows, the Boiler Inspection Act, to apply, the engine must be in use on its line. The facts may or may not develop whether we have a case under the Boiler Inspection Act, or whether it comes only under the Federal Employers' Liability Act, but that is something I [7] think the evidence will have to develop.

Also I may want to amend my complaint at the end to conform to the proof. For instance, we allege that they squirted oil into the boiler, or the firebox and that that caused the flareback. I have since found out that is not correct, they opened the throttle and steam went in there, rather than oil.

Mr. Dunne: We will have no objection to that. That can be gone into, we will not be mislead by that, we know what happened in a general way. I don't know the technical aspects of it.

The Court: That is evidentiary.

Mr. Dunne: That is right.

Mr. Thomas Ryan: Also in the complaint, I drew it mostly from what the plaintiff told me, as was told to the jury this morning, a fracture of the tibia and fibula. That is not correct, compound comminuted fracture——

The Court: I think we are trying this as pre-

trial right now. Instead of allowing amendment to the pleadings the Court will order that the issue to be presented to the jury will be the issue raised in the complaint as well as the issue as to whether or not the plaintiff was at the time specified a student fireman, and that will present the whole matter.

Mr. Dunne: That is right.

Mr. Thomas Ryan: That is right.

Mr. Dunne: None of us are mislead as to the facts, no new [8] fact to be brought in here.

The Court: The remainder of the jurors need not remain any longer. Your services will not be required today.

Mr. Dunne: So the record may be clear, that answer will be filed and the amendment to the answer.

The Court: You can file the answer, amendment to the answer. The Court has no objection to your doing that. In view of what we have stated, the issues that will go to the jury has now been stated, irrespective whether you have alleged them in formal terms or not by way of pleadings.

Mr. Dunne: That is right. I will ask it be filed so we can clear the record on that.

The Court: Very well, you may file it.

STIPULATION

It Is Stipulated that the foregoing is a correct transcript of a portion of the proceedings in the above-entitled Court and cause, not transcribed and

made a portion of the record certified to the United States Court of Appeals for the Ninth Circuit, in Southern Pacific Company, a Corporation, Appellant, v. Roger N. Libbey, Appellee, No. 13078 (see note bottom of page 42 of the printed transcript in No. 13078) and that it may be filed in the United States Court of Appeals in this said entitled and numbered matter as a supplement to the transcript therein and thereafter dealt with agreeably to the Rules of the said United States Court of Appeals.

/s/ A. B. DUNNE,

DUNNE, DUNNE & PHELPS,
Attorneys for Appellant.

RYAN and RYAN,

By /s/ DANIEL V. RYAN,
Attorneys for Appellee.

[Endorsed]: Filed November 13, 1951. [9]

[Endorsed]: No. 13078. United States Court of Appeals for the Ninth Circuit. Southern Pacific Company, Appellant, vs. Roger N. Libbey, Appellee. Supplemental Transcript of Record. Appeal from the United States District Court, for the Northern District of California, Southern Division.

Filed November 14, 1951.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Court of Appeals for the Ninth Circuit.